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No. 01-400

IN THE

Supreme Court of the United States

RICKY BELL, WARDEN,
Petitioner,

v.

GARY BRADFORD CONE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of respondent Gary Bradford Cone, with the written consent of the parties.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in defending standards of professional advocacy and upholding the constitutional commitment to the effective assistance of counsel. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000).

This brief, like the brief of the United States as amicus for petitioner, is limited to the ineffective assistance issue raised in question two of petitioner's brief.

SUMMARY OF ARGUMENT

"The right to the effective assistance of counsel is [] the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). The prosecution's argument at the penalty phase of respondent's trial – that Gary Cone should die – was never subjected to that "meaningful adversarial testing." As a result, there can be

no confidence in the fairness or reliability of the sentencing proceeding. *Id.* at 654-56. The Sixth Amendment does not permit that outcome to stand – not in any case, and certainly not in a capital case, where concerns for fairness and reliability are at a premium.

Petitioner's first line of attack on this straightforward position is to minimize the nature of counsel's nonperformance at the penalty proceeding. But this is not a case about an isolated attorney error, or even a series of discrete attorney missteps. This is a case about an attorney's complete failure to answer the State's argument for death with an affirmative argument for life – to forgo both of the primary tools of advocacy at a penalty proceeding, *i.e.*, presentation of mitigating evidence and closing argument, and to create for the jury what must have been an indelible impression of a client so deserving of the death sentence that even his own lawyer is left without any response to the prosecution. No amount of disaggregating by petitioner can disguise the combined effect of counsel's complete abdication here.

Petitioner's fall-back position is that *Cronic* does not, or at least should not, mean what it says. We disagree. *Cronic* is perfectly clear about the rule it establishes: When counsel ceases to function as a meaningful adversary of the state, it is as though counsel is absent altogether, and there is no need for any further inquiry into prejudice or specific harm to make out a violation of the Sixth Amendment. And nothing about the *Cronic* principle has proved unwise or unworkable in practice. In the rare instances in which the lower courts have resorted to it, the *Cronic* standard has operated just as it was intended, to prevent the fairness and legitimacy of criminal proceedings from being undermined by breakdowns of the adversarial process.

ARGUMENT

I. COUNSEL ENTIRELY ABDICATED HIS BASIC ADVERSARIAL RESPONSIBILITY IN RESPONDENT'S CAPITAL SENTENCING HEARING.

The question in this case is whether respondent's counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 659 (1984), in the capital sentencing proceeding that resulted in respondent's death sentence. The answer is yes. Counsel entirely abdicated his most basic duty as an advocate in the penalty proceeding – to make an affirmative case for a life sentence to counter the prosecution's case for death. In fact, counsel literally stood silent in response to the prosecution's case for imposition of the death sentence, leaving the jury with the inescapable impression that there was no argument at all to be made for sparing respondent's life. That constitutes a breach of counsel's adversarial responsibilities of the most fundamental kind.[2]

A. Counsel's Fundamental Duty In A Capital Sentencing Hearing Is To Make An Affirmative Case For A Life Sentence.

The question for the jury in a capital sentencing proceeding is which sentence – life or death – best "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (emphasis in original) (internal quotation marks omitted).

[2] This brief does not address separately the State's contention that 28 U.S.C. § 2254(d)(1) barred the court below from vacating respondent's death sentence. As respondent explains, whether 28 U.S.C. § 2254(d)(1) precludes relief in this case turns entirely on the merits of the Sixth Circuit's conclusion that *United States v. Cronic* provides the governing framework for respondent's ineffective assistance claim. That conclusion is correct for the reasons we explain here.

The objective of defense counsel can be stated in stark terms: "The goal at the sentencing phase is to help the jury see the client as someone they do not want to kill." American Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("*ABA Guidelines*"), 11.8 commentary (1989). After all, "[o]nce the defendant has been found guilty of a capital crime, a life sentence is counsel's only remaining advocacy goal." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 318 (1983). And because the jury – having already found the defendant guilty of a capital crime – is generally predisposed to imposing the death sentence, it is up to counsel to present an affirmative case to the jury for sparing the defendant's life. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 341 ("At the sentencing stage, the defendant, having been convicted of a capital offense, usually faces a sentencer already inclined towards imposing the death penalty unless the defense provides it with a reason not to").[3]

The twin pillars of counsel's affirmative case for a life sentence are interrelated. The first entails the introduction of mitigating evidence about the defendant's "background, character, and crime," *Penry*, 492 U.S. at 319, as a counterweight to the aggravating circumstances presented by the prosecution. The Constitution of course prohibits any limitation on the jury's consideration of mitigating evidence about a capital defendant. *See Eddings v. Oklahoma*, 455 U.S.

[3] *See also* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 12 (1992) ("The data suggest that the sentencing phase of a capital trial commences with a substantial bias in favor of death."); Tennessee Ass'n of Criminal Def. Lawyers, *Tools for the Ultimate Trial: The TACDL Death Penalty Defense Manual*, 14.13 (1992) ("After considering all the gruesome evidence of guilt, the jurors often need no additional reasons to impose death.").

104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 568, 604 (1978) (plurality). And it is generally accepted in the capital defense bar "that the presentation of mitigation in the penalty phase is of overwhelming importance." Craig Haney, *Taking Capital Jury Seriously*, 70 Ind. L.J. 1223, 1227 (1995); *see ABA Guidelines*, *supra*, 11.8.2(D) & 11.8.6(C) (describing counsel's obligation to "ensure that all reasonably available mitigating and favorable information . . . is presented to the jury in the most effective possible way" and to "consider all potential methods of offering mitigating evidence to the sentencing entity"). The presentation of a case in mitigation assumes special importance where, as here, the jury is instructed that if the aggravating circumstances "are not outweighed by any mitigating circumstances," "the sentence *shall* be death." J.A. 57 (emphasis added); *see, e.g., Hall v. Washington*, 106 F.3d 742, 752 (7th Cir. 1997) ("Without a reasonable showing of mitigation by the defense, the court had no choice: under the Illinois death penalty scheme, if no sufficient mitigating factors are found, 'the court *shall* sentence the defendant to death.'").

The second basic element of counsel's affirmative case for a life sentence is the closing argument to the jury. The "closing arguments of counsel are a critical stage of the penalty trial. For defense counsel, there may be no more awesome task than delivering a plea for life." California Death Penalty Defense Manual, Vol. 2, H-225 (1986). Closing argument represents counsel's sole opportunity to explain to the jury why, in view of the various mitigating and aggravating evidence presented to it, the appropriate "reasoned *moral* response" in the circumstances is to show mercy. *Penry*, 492 U.S. at 319. The principal objective is to "humanize" the defendant, by marshaling the mitigating evidence and weaving it into a coherent explanation of how an individual whose life is worth sparing could commit an offense so grave. *See TACDL Death Penalty Defense Manual*, *supra*, at 14.94.

Closing argument in this sense works hand-in-hand with the presentation of mitigating evidence, and "can be the single most important part of a capital murder trial." Roy Brasfield Herron, *Defending Life in Tennessee Death Penalty Cases*, 51 Tenn. L. Rev. 681, 758 (1984).

Because the jury's decision is based ultimately on an indefinite "moral response" to the defendant's circumstances rather than on an objective finding of determinate fact, a skillful use of mitigating evidence and closing argument can overcome even the most substantial case in aggravation. "In fact, most experienced capital defense attorneys are able to cite cases in which the defendant's life was spared despite overwhelming evidence of aggravating circumstances." White, *supra*, at 365.[4] As is by now well established, however, the quality of advocacy in capital cases represents one of the "principal failings of the capital punishment systems in the states today," and too often falls far short of the ideal. American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. L. Rev. 1, 16 (1990); *see* Stephen B. Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crimes But for the*

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[4] Consider, for instance, the following cases where Tennessee juries found that the State had established multiple aggravating circumstances yet were persuaded to return life sentences. *State v. Harris*, 989 S.W.2d 307 (Tenn. Crim. App. 1999) (victim was kidnapped, shot, and mutilated); *State v. Julian*, 1997 Tenn. Crim. App. LEXIS 702 (1997) (rape, kidnapping, and murder of a young girl); *see also Cox v. State*, 880 S.W.2d 713 (Tenn. Crim. App. 1994); *State v. Bibbs*, 806 S.W.2d 786 (Tenn. Crim. App. 1991). The point is further confirmed by instances in which a jury is persuaded to return a life sentence in the retrial of a defendant who was previously sentenced to death. *See, e.g.*, Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 Rutgers L. Rev. 281, 331-33 (1991); White, *supra*, at 324-26 (discussing case in which "[i]t took the second jury almost exactly the same amount of time to reach a unanimous sentence of life as it had taken the first jury to sentence the defendant to death).

Worst Lawyer, 103 Yale L.J. 1835, 1841 (1994).

B. Counsel Made No Case For A Life Sentence In Response To The State's Case For Death.

This is not a case in which counsel's performance of his basic responsibility at sentencing falls somewhat short of the ideal. This case is in an altogether different category: counsel literally made *no* affirmative argument for a life sentence in response to the prosecution's case for death.

To make its case at sentencing, the State presented the testimony of a number of witnesses as to the existence of four statutory aggravating factors. After the State completed its proof of the four aggravating circumstances, counsel for respondent introduced no evidence – none at all – in mitigation, even though he had "plenty of mitigating evidence at his fingertips." Pet. App. 35. Then, the State made its closing argument, in which it reviewed "the proof as relates to aggravating circumstances and mitigating circumstances," reiterated the four aggravating factors, stated that those factors had "been proven . . . beyond a reasonable doubt and to a moral certainty," and urged that "the aggravating circumstances outweigh the mitigating circumstances" and therefore compelled imposition of a death sentence. J.A. 50-52. Counsel for respondent made no argument in response, stating instead only that he "waive[d] final argument." *Id.* at 52.

The jury, in short, was presented with no affirmative argument for a life sentence to counter the State's argument for death. In fact, given the sequence of events, counsel did more than fail to make an affirmative argument for life. Through his complete silence following the close of the State's case, counsel gave the jury the impression that, after hearing the strength of the State's case for the death sentence, he had no choice but to acquiesce. Pet. App. 36; *see Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998) ("fail-

ure to offer evidence or make argument amounts to a concession that the death penalty should be imposed, and an abandonment of the client to that fate").

Nothing else about counsel's actions at the sentencing proceeding can compensate for this fundamental failing. Though counsel briefly cross-examined one of the State's witnesses and successfully objected to the introduction of one of the State's exhibits, neither of those defensive efforts went toward explaining to the jury why they should spare respondent's life. Nor can counsel's brief opening statement, made before the State presented its case, carry the weight petitioner assigns it. To be sure, that statement did refer to testimony in the *guilt* phase concerning respondent's drug abuse and mental condition. But because counsel presented no evidence and waived closing argument, there was no subsequent reference to respondent's mental state *after* the jury had been confronted with the state's case for death, and thus no effort to explain how the guilt phase evidence could justify a life sentence in the face of the state's unrebutted argument to the contrary.

Indeed, given the failure to introduce evidence or to make a closing argument, there was no occasion to explain to the jury why that evidence – which the jury already had rejected in the course of convicting respondent – should be considered mitigating at all. *See Penry*, 492 U.S. at 320 ("The jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence."). Nor was there any reason to assume that the lay jury could find its way to the mitigating properties of the evidence on its own. Such an assumption is always unwarranted. *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality) ("Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are

given."). But it is especially dangerous when, as here, the evidence goes to mental or emotional difficulties. As this Court has recognized, such evidence is a "two-edged sword," likely to be perceived by a sentencing jury as *aggravating* unless its mitigating potential is explained. *Penry*, 492 U.S. at 324 (evidence of mental difficulties can "diminish [] blameworthiness for [a] crime even as it indicates that there is a probability that [the defendant] will be dangerous in the future").

The irreducible minimum of meaningful advocacy by defense counsel in a capital sentencing hearing is this: "A true advocate cannot permit a capital case to go to the sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance." Goodpaster, *supra*, at 335-36. That is precisely what happened in this case.

II. *CRONIC* SETS THE APPROPRIATE STANDARD WHEN COUNSEL FAILS TO SUBJECT THE STATE'S CASE FOR DEATH TO MEANINGFUL ADVERSARIAL TESTING.

A. This Case Is Governed By The *Cronic* Standard For Breakdowns Of The Adversarial Process Rather Than The *Strickland* Standard For Specific Attorney Errors.

1. In *United States v. Cronic*, 466 U.S. 648, 654-56 (1984), this Court established that the right to counsel protected by the Sixth Amendment entails more than mere appointment, or even presence, of counsel. Instead, the Sixth Amendment guarantees the *effective* assistance of counsel – not as an end in itself, but as a means of vindicating the underlying "right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656. It follows, the Court held, that when that "adversarial testing" does not occur, the Sixth Amendment is

violated. *Id.* at 656-57. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659.

This conclusion, sometimes referred to as the "*Cronic* presumption" of ineffective assistance, is perfectly straightforward. That the assistance of counsel is absolutely essential to the functioning of a fair trial is by now well understood. *See id.* at 653-57; *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). So is the principle that actual denial of counsel at a critical stage of trial is a *per se* Sixth Amendment violation, without the necessity for any further inquiry into prejudice or other harm to the defendant. *See Cronic*, 466 U.S. at 659 & n.25. *Cronic* simply applies the same principle to the constructive denial of counsel that occurs when a lawyer so thoroughly abdicates his responsibility that an "actual breakdown of the adversarial process" results. *Id.* at 657; *see Strickland*, 466 U.S. at 692 (*Cronic* establishes that "[a]ctual or constructive denial of the assistance of counsel altogether" constitutes Sixth Amendment error).

The *Cronic* standard, of course, applies only rarely. But this is the rare case that squarely implicates *Cronic*. At the most critical stage of respondent's trial – the stage that would determine whether respondent lived or died – counsel let the State's case for death go unanswered. After the prosecution put on evidence of aggravating factors and argued for death, counsel simply sat silent. No other aspect of counsel's performance – not evidence introduced at the guilt phase of trial, not counsel's opening statement – can cure this central defect in the proceedings. *See supra* at 9. Counsel's failure to respond to the prosecution's case with either mitigating evidence or a closing argument deprived the penalty phase of the "meaningful adversarial testing" that would have made it presumptively reliable, *see Cronic*, 466 U.S. at

659, and constitutes a Sixth Amendment violation under the *Cronic* standard.

2. Though this case seems clearly to fit within the terms of *Cronic*, the state and its amicus argue that *Strickland v. Washington*, rather than *Cronic*, should govern respondent's ineffective assistance claim. But the familiar *Strickland* standard – requiring a showing by defendant of both deficiency and prejudice, 466 U.S. at 687 – is designed for a very different class of claims.

The vast majority of ineffective assistance claims do not – and could not – allege that counsel has failed to subject the state's case to any meaningful adversarial testing, as is required to make out a *Cronic* violation. Instead, they fall into what *Cronic* itself recognized as an entirely distinct category of ineffective assistance claims: those focusing on "specific errors and omissions" that counsel may have made in the course of providing adversarial representation. 466 U.S. at 657 n.20, 656. It is these claims of discrete attorney errors, *Cronic* makes clear, rather than claims of more thoroughgoing adversarial breakdown, that are subject to the standard announced in *Strickland*. 466 U.S. at 657 n.20, 666-67 & n.41 (remanding for inquiry under *Strickland*). And *Strickland* works in tandem with *Cronic*, its companion case, to solidify the distinction between attorney error cases, on the one hand, and those involving *Cronic*-style constructive denial of counsel, on the other. 466 U.S. at 692-93. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 482-83 (2000) (distinguishing between *Strickland* "cases involving mere 'attorney error'" and *Cronic* cases involving actual or constructive denial of counsel).

Respondent in this case is not alleging the kind of specific attorney error or omission that is cognizable under *Strickland*. Both the State and its amicus proceed as though he were, breaking counsel's nonperformance at sentencing

into constituent parts and treating his failure to present mitigating evidence and his failure to make a closing argument as isolated and discrete attorney errors. *See* Pet. Br. at 27, 31; U.S. Br. at 16, 17. That is a critical category mistake, and it goes directly to the heart of this case. The problem here is not that counsel made a series of specific errors, any or all of which constituted ineffective assistance under *Strickland*. It is that the combined effect of counsel's failings – a combined effect that neither the state nor the United States ever once addresses – was to leave the State's case for death, once made by the prosecution, entirely untested by the defense. *See supra* at 8-10. This is precisely the kind of adversarial breakdown that both *Cronic* and *Strickland* reserve for evaluation under the *Cronic* standard.

3. None of this Court's cases suggests that respondent's claim must be evaluated under *Strickland* rather than *Cronic*. Contrary to the suggestion of both petitioner and the United States, for instance, this Court never has held that the *Cronic* standard applies only when the *government* interferes with the performance of counsel (apart, apparently, from a somewhat *ad hoc* exception for conflict-of-interest cases). Pet. Br. at 36, U.S. Br. at 12-13. In fact, *Cronic* itself expressly rejects the position that its standard should be reserved for cases in which "external constraints" produce a breakdown in the adversarial process: "[T]hat the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment . . . ." 466 U.S. at 662 n.31.

There is no reason to think that *Strickland*, issued the same day, takes a different view of the scope of the *Cronic* rule. On the contrary, *Strickland* excludes from its own ambit not only cases of state interference with counsel but also those of "constructive denial" of counsel's assistance, 466 U.S. at 692, thus leaving for *Cronic* cases in which a law-

yer's own failings result in the absence of any meaningful adversarial testing. *See also id.* at 703 n.2 (opinion of Brennan, J.) ("counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel" evaluated under *Cronic*); *Flores-Ortega*, 528 U.S. at 481-82 (whether *Strickland* or *Cronic* applies to claims involving counsel's performance turns on "magnitude of the deprivation of the right to effective assistance"); *Lockhart v. Fretwell*, 506 U.S. 364, 386 (Stevens, J., dissenting) (noting that there "may be exceptional cases in which counsel's performance falls so grievously far below acceptable standards" that *Cronic* applies).

Nor do any of the Court's prior decisions regarding ineffective assistance of counsel during penalty phase proceedings control this case. *See* U.S. Br. at 16-17. The cases relied on by petitioner and his amicus all involve the kind of "specific errors and omissions," 466 U.S. at 657 n.20, that fall naturally within the purview of *Strickland*. *See Strickland*, 466 U.S. at 675 (failure to include particular mitigating evidence in penalty phase presentation); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986) (limiting penalty phase presentation to "simple plea for mercy from petitioner himself"); *Burger v. Kemp*, 483 U.S. 776, 788 (1987) (failure to develop and introduce mitigation evidence); *Williams v. Taylor*, 529 U.S. 362, 395-99 (2000) (failure to investigate and include particular mitigating evidence). None presented the Court with the combined effect on a penalty proceeding of defense counsel's failure to present any mitigating evidence and waiver of closing argument – *i.e.*, a complete failure to answer the prosecution's case for death – and in none, therefore, did the Court even have occasion to consider the potential application of *Cronic*.

B. Application Of *Cronic* To The Rare Case In Which Attorney Default Leads To An "Adversarial Breakdown" Is Both Necessary and Sensible.

1. Petitioner's bottom-line is this: The Court should use this occasion to adopt the rule that "bad lawyering, no matter how bad" is always to be evaluated under *Strickland* – and particularly *Strickland*'s prejudice prong – rather than under *Cronic*. *See* Pet. Br. at 37. That would be a mistake.

For the great majority of ineffective assistance claims, *Strickland* does provides a sensible and workable standard. In most attorney performance cases, *Strickland*'s prejudice prong, requiring the defendant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 466 U.S. at 694, functions just as it should, separating out those attorney errors that undermine confidence in the fairness and outcome of the proceeding from those that do not. *See id.* at 686, 692; *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (ineffective assistance inquiry identifies cases in which "counsel's unprofessional errors so upset the adversarial balance . . . that the trial was rendered unfair and the verdict rendered suspect.").

But there are a few exceptional cases of attorney performance – or, more accurately, attorney *non*performance – in which application of *Strickland*'s prejudice prong could lead to results inconsistent with the Sixth Amendment principles that underlie *Strickland* itself. These cases involve only the most egregious forms of attorney nonperformance and abdication: the attorney who sleeps through substantial portions of his client's trial, for instance, *see Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), petition for cert. pending, No. 01-495, or the attorney who repeatedly expresses his contempt for his client, effectively acting as a second prosecutor, *see Rickman v. Bell*, 131 F.3d 1150 (6th

Cir. 1997). In these very limited circumstances, the lower courts have discovered, *Strickland*'s measure of prejudice may fail to capture an attorney default so serious that it threatens the integrity of the trial process.

Part of the problem is that the fundamental nature of an attorney's failure in those situations may make it difficult to pinpoint prejudice in *Strickland*'s outcome-determinative terms. When counsel entirely abdicates his adversarial role, the reviewing court must both conjure what might have been the hypothetical defense and then consider whether it might have made a difference – a doubly speculative undertaking. *See Burdine*, 262 F.3d at 355 ("We presume prejudice because experience tells us that an occurrence presents both a high probability of prejudice and a difficulty of 'proving it' it any finite sense.").[5]

The other part of the problem is that in the narrow class of cases containing egregious attorney nonperformance, the question asked by *Strickland*'s prejudice prong – is there a likely effect on the outcome? – is incomplete. The Sixth Amendment is concerned with the reliability of outcomes, to be sure. *See Strickland*, 466 U.S. at 692. But it is equally concerned with the justness of outcomes and with the fairness and legitimacy of the procedures that produce them. *See id.* at 686-87; *Williams*, 529 U.S. at 391; *Kimmelman*, 477 U.S. at 374. So if defense counsel completely defaults on his responsibility to perform as an advocate, then it is not enough to satisfy the Sixth Amendment that the evidence of defendant's guilt may seem overwhelming, *see Rickman*, 131

[5] This problem may be especially acute in the penalty phase of capital proceedings. Because the sentencer enjoys the discretion to consider *any* evidence that he or she believes to be mitigating, it is particularly difficult to assess the effect of mitigating arguments never made. *See, e.g.*, Bright, *supra*, at 1865-66; *cf. Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (harmless error analysis in penalty phase context "may be more difficult because of the discretion that is given to the sentencer").

F.3d at 1156, or that the defendant may have difficulty proving that the outcome of his trial would have been different had his lawyer been awake, *see Burdine*, 262 F.3d at 357 (Jolly and Smith, JJ, dissenting). Regardless of whether there is a demonstrable effect on outcome for *Strickland* purposes, counsel's abdication means that there can be no confidence in the fundamental fairness of the proceedings. *See Cronic*, 466 U.S. at 655-56 (right to counsel assures fairness of trial itself).

It is not surprising that *Strickland*'s prejudice inquiry is ill-equipped to take account of exceptional cases involving total attorney default. As discussed above, *Strickland* was never intended to govern such cases. *Cronic* was, and in the rare instances in which the lower courts invoke it, the *Cronic* standard operates to protect the "fairness, and thus the legitimacy of our adversary process," *Kimmelman*, 477 U.S. at 374. *See Rickman*, 131 F.3d at 1160; *Burdine*, 262 F.3d at 346. When "bad lawyering" is the equivalent of no lawyering at all, *Cronic* serves a vital function. This Court should reject petitioner's proposed curtailment of the *Cronic* standard and instead reaffirm its application to such cases.

2. The United States takes a slightly different position than petitioner. Though it appears to agree with the State in principle, *see* U.S. Br. at 12-14, it is willing to admit that there may be some cases involving attorney performance to which *Strickland* should not apply, *see id.* at 21-22. So the rule the United States would have the Court adopt seems to be this: so long as the government has not interfered with counsel's representation, *Strickland* governs – except when counsel is absent, *id.* at 12; when counsel represents conflicting interests, *id.* at 13; perhaps (though not necessarily) when counsel is "sleeping (and therefore unconscious)," *id.* at 22; when counsel "fail[s] to make any comment" at a sentencing hearing, *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992), U.S. Br. 21; when counsel fails to object to a directed ver-

dict, *Harding v. Davis*, 878 F.2d 1341, 1344 (11th Cir. 1989), U.S. Br. at 21; and when counsel's strategy is to decline to put on any defense at trial, *see Martin v. Rose*, 744 F.2d 1245, 1250 (6th Cir. 1984), U.S. Br. at 21.

A more straightforward approach might be to acknowledge the general principle that ties together these otherwise *ad hoc* "exceptions." That principle comes directly from *Cronic*: When counsel ceases to function as the state's adversary in any meaningful sense, it is as though counsel is absent, and no further showing of harm is needed to identify a Sixth Amendment violation. 466 U.S. at 653-55. When "the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-57.

The problem for the United States is that the principle, once articulated, applies as readily to respondent's case as to any the United States cites approvingly in its brief. It is not clear, for instance, what line the United States would draw between a case like this one, in which counsel fails to make any affirmative case for life to counter the prosecution's case for death, and a case like *Harding*, *supra*, which turns critically on counsel's failure to object to a single motion – albeit one for directed verdict – by the prosecution, 878 F.2d at 1344-45; or between this case and one like *Martin*, *supra*, in which counsel's decision to "abandon all attempts to defend his client at trial in favor of reversal on appeal" was supported by what even the reversing court conceded was a "superficially persuasive" strategic rationale, 744 F.2d at 1250. Sensible lines can be drawn in this area, but not in a vacuum. Once the *Cronic* principle is used as the reference point – and the nature of the default in this case properly understood, *see supra* at 8-10 – respondent's case joins the same category as the other "*Strickland* exceptions" noted by the United States.

3. Finally, pointing to what it describes as the policy justifications behind *Cronic* and *Strickland*, the United States argues that in cases in which the government has not interfered with counsel's performance, *Cronic* should apply only if "the court can easily identify the denial of the right to counsel and prejudice is so likely that a case-by-case examination of prejudice is not worth the effort." U.S. Br. at 22; *see also* Pet. Br. at 36 (making similar argument). That argument is unavailing for two reasons.

First, it elevates what is a supporting rationale in *Cronic* and *Strickland* to the level of first principle. Neither *Strickland* nor *Cronic* is a case chiefly about judicial efficiency. Though in both cases the Court demonstrates appropriate concern for matters of practicality, *see Cronic*, 466 U.S. at 658; *Strickland*, 466 U.S. at 692, in neither does it suggest that the ineffective assistance inquiry can be reduced to a cost-benefit analysis.

In any event, this case – like most cases involving adversarial breakdown under *Cronic* – meets the practical criteria held out by the United States. It is true that many attorney deficiencies are difficult for reviewing courts to identify and impossible to "define[] with sufficient precision to inform defense attorneys correctly just what conduct to avoid." *Strickland*, 466 U.S. at 693. This case is different. There is nothing difficult about identifying the defect in counsel's performance here. The Sixth Circuit was not required to pore over the record to determine that counsel, by failing to present mitigating evidence at sentencing and waiving closing argument, passed up any opportunity to respond to the State's case for death with his own case for life. Nor is it likely that this kind of nonperformance could ever be justified by legitimate strategic considerations of the sort discussed in *Strickland*. 466 U.S. at 689-90. Indeed, counsel for respondent never offered *any* strategic justification, no matter how implausible, for the *combined* failure to present

evidence and make a closing argument that is at the heart of this case.[6]

And from the perspective of defense attorneys, the complete failure to present any case for a life sentence in response to the State's case for death can be defined quite succinctly as "conduct to [be] avoid[]ed" by counsel. *Strickland*, *supra*. When it is feasible, as is the case here, this Court has not hesitated to describe and enforce certain minimal standards of representation. *See Flores-Ortega*, 528 U.S. at 480 (counsel has a "constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal . . . or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing"). That enterprise is enormously helpful to NACDL in its efforts to maintain and defend professional standards of conduct.

As for prejudice, it bears repeating that the United States' position – that *Cronic* should apply only when *Strickland* prejudice is likely to be provable – would defeat the purpose of *Cronic*: to capture the rare case of egregious attorney de-

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[6] As for the *post hoc* justification offered by counsel for his failure to make a closing argument – his concern about the oratorical prowess of the lead prosecutor – NACDL adopts the responses of the Sixth Circuit and respondent. *See* Pet. App. 35-36. NACDL adds only its hope that this case will serve to confirm that professional standards do not countenance forgoing closing argument at a capital sentencing proceeding for fear of being outmatched in the declamatory arts. *See Tools for the Ultimate Trial*, *supra*, at 14.98 ("Because the state cannot properly reserve any significant point not already discussed by the parties for its summation, it is foolhardy to waive final argument in order to deny the prosecutor the opportunity to fire a closing salvo. If you have done a good job, you will be able to make an effective argument that can both give the jury some reason not to kill the defendant and take the sting out of the prosecutor's summation.").

fault for which the *Strickland* prejudice inquiry was never intended and is ill-suited. *See supra* at 16-17. But accepting *arguendo* the United States' premise, the fact remains that an actual breakdown of the adversarial system is indeed likely to prove prejudicial in *Strickland* terms. In most cases, it can fairly be said that counsel's failure to subject the state's case to any meaningful adversarial testing is reasonably likely to affect the outcome of a proceeding. This case illustrates the point. Counsel's failure to respond to the State's case for death with an argument for life must have affected the jury's view of the aggravating evidence as well as of the case in mitigation, and may well have created the affirmative misimpression that the state's plea for death was unanswerable. *See* Pet. App. 36; *supra* at 8-9. This is precisely the kind of "pervasive effect" that *Strickland* itself identifies as especially likely to be prejudicial in *Strickland* terms. *See* 466 U.S. at 695-96 (describing errors that "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture").

It is not surprising, then, that lower courts applying *Strickland* to similar, though not entirely comparable, failures of advocacy at capital sentencing – no presentation of mitigating evidence combined with substandard closing argument –find both deficient performance and prejudice under the *Strickland* standard. *See Smith v. Stewart*, 140 F.3d 1263 (9th Cir. 1998); *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997); *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989). If, as the United States urges, *Cronic* sensibly applies when the outcome likely would be the same under the more time- and record-intensive *Strickland* analysis, then *Cronic* sensibly applies to this case and cases like it.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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